

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF PUERTO RICO

In re:	:	
	:	
JOSE MENDEZ ROSADO and	:	Case No. 82-01460 (GAC)
ALEJANDRA BECERRA ESPINOSA	:	
	:	
Debtors	:	
	:	Chapter 7
	:	
MARIA LUISA CONTRERAS, TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
v.	:	Adv. No. 94-0044
	:	
JOSE MENDEZ ROSADO, ET AL.	:	
	:	
Defendants	:	
	:	

DECISION AND ORDER

BACKGROUND

Before the Court is a joint motion by José A. Cuevas Segarra, Amneris Martínez and the conjugal partnership constituted by them (collectively "Cuevas") and Antonio R. Concepción Velázquez, Agna Morales and the conjugal partnership constituted by them (collectively "Concepcion") to alter or amend judgment pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure (dkt. #76). The trustee filed an opposition to the joint motion (dkt. #78).

On July 21, 1995, the Court entered a Memorandum Opinion and Order granting the trustee summary judgment against the above named defendants on the trustee's third cause of action in the

amount of \$27,456.00, with interest at the legal rate from May 1989 until repaid and the trustee's costs attributable to the third cause of action. Judgment was entered on August 1, 1995.

Cuevas and Concepción are requesting reconsideration of the Court's Opinion and Order on four grounds. First, they argue that the trustee had the obligation to obtain the Court's approval for their appointment as special counsel and accordingly, the Court should determine that he is the responsible officer before the Court. Second, they argue that the Court erred in concluding that the trustee was entitled to turnover of the funds pursuant to 11 U.S.C. § 105(a) irrespective of the time limitation imposed by 11 U.S.C. § 549. Third, they argue that a trustee seeking to avoid a post-petition transfer of property of the estate may only proceed under 11 U.S.C. § 549 and the two year statute of limitations under this section had run prior to the filing of this action. Fourth, they argue that the judgment should be amended to direct Cuevas and Concepción to turnover to the trustee the amounts that each received as compensation for their professional services. They indicate that the sum of \$27,456.00 was divided equally between them. Thus, if they are found liable, they argue that each should be held liable in the amount of \$13,728.00.

The trustee argues that the motion for reconsideration may have been untimely. The trustee also opposes the other arguments

raised by the defendants. The trustee indicates that the argument regarding Urrutia's obligation to obtain the appointment of Cuevas and Concepción was not raised prior to the motion for reconsideration and thus may not be raised now. The trustee also argues that this argument has no merit. The trustee argues that the defendants' arguments regarding use of 11 U.S.C. §§ 105(a) and 549 are simply a repetition of the arguments raised in the answer to the trustee's motion for summary judgment. With respect to the amounts that Cuevas and Concepción each received, the trustee does not dispute that the sum of \$27,456 was divided equally between them, but still argues that they should be held jointly and severally liable for the entire amount in this action.

DISCUSSION

Pursuant to Fed.R.Civ.P. 59, made applicable by Fed.R.Bankr.P. 9023, a motion to alter or amend a judgment must be served not later than 10 days after the entry of judgment. Service by mail is complete upon mailing. Fed.R.Civ.P. 5(b), made applicable by Fed.R.Bankr.P. 7005(b). In this case, the judgment which Cuevas and Concepción request the Court to reconsider was entered on August 1, 1995. Their motion for reconsideration was filed with the Court on August 11, 1995 and the certificate of service attached to the motion indicates that it was mailed on the same date to the other parties. Thus, the

Court finds that the motion was filed and served not later than 10 days after the entry of judgment and therefore is timely.

Cuevas and Concepción attempt to evade their liability to turnover to the trustee the unauthorized professional fees received from this estate by arguing that the former trustee, Urrutia, had the obligation to obtain the Court's approval for their appointment as special counsel and accordingly, the Court should determine that Urrutia is the responsible officer before the Court. The Court agrees that the trustee in a Chapter 7 case is the only entity that has the authority to apply for the appointment of an attorney to represent or assist the trustee in carrying out the trustee's duties under Title 11.¹ See 11 U.S.C. § 327(a) and Fed.R.Bankr.P. 2014(a). It is well settled, however, that a trustee's failure to seek the appointment of counsel does not allow unappointed counsel to retain fees received from property of a bankruptcy estate. To the contrary, "[f]ailure to receive court approval for the employment of a professional in accordance with § 327 and Rule 2014 precludes the

¹Cuevas and Concepcion indicate that the Court concluded to the contrary in the Court's Memorandum Opinion and Order of July 21, 1995. The Court did not intend to draw this legal conclusion. Unfortunately, confusion arose in this case because Cuevas and Concepción referred to themselves as attorneys for debtors. Some of the confusion existed because after the debtors filed bankruptcy the malpractice action continued with the debtors listed as plaintiffs. Then, the initial application to appoint Geigel to prosecute the action was filed by debtors. Concepción later filed a motion on behalf of debtors seeking the appointment of himself and Cuevas.

payment of fees." In re Shirley, 134 B.R. 940, 944 (9th Cir. BAP 1992) (citations omitted). A noted bankruptcy commentator states that:

[w]hen there is no compliance with the Code or Rules, a professional may forfeit his or her right to compensation. The services for which compensation is requested should have been performed pursuant to appropriate authority under the Code and in accordance with an order of the court. Otherwise, the person rendering services may be an officious intermeddler or a gratuitous volunteer. The purpose of the rule requiring prior court authorization of employment is to provide the court with a means of control over administrative expenses. Thus an attorney who acts for a trustee or on behalf of a trustee without approval by the court may be denied any compensation even though valuable services were rendered in good faith. Normally in the absence of an order of retention, the applicant must look to its own client for compensation.

2 *Collier on Bankruptcy*, ¶ 327.02 at 327-11--327-17 (15th ed. Supp. 2/94) (footnotes omitted). Thus, regardless of the fact that it may have been Urrutia's responsibility to file the application for the employment of Cuevas and Concepción, they were not entitled to compensation for professional services rendered to the trustee or the estate without an order approving their employment.

Moreover, a professional has no entitlement to professional fees in connection with a bankruptcy case without the Bankruptcy Court's approval of the professional's application for compensation. See 11 U.S.C. § 330(a)(1)-(a)(1)(A) and Fed.R.Bankr.P. 2016(a). Without compliance with the Bankruptcy

Code and Bankruptcy Rules requiring the filing of an application for compensation, there is no right to compensation. Albers v. Dickenson, 127 F.2d 957, 961 (8th Cir. 1942); In re Lavender, 48 B.R. 393, 396 (Bankr. E.D. Ark. 1984); 2 *Collier on Bankruptcy*, ¶ 330.03 at 330-16.2--330-16.3 (15th ed. Supp. 3/95) (footnotes omitted). Because Cuevas and Concepción have never filed an application for compensation in this case, at no time did they become legally entitled to receive professional fees from this estate.

The second and third arguments raised by Cuevas and Concepción relate to issues that were addressed in this Court's previous Opinion and Order. Cuevas and Concepción argue that the Court erred in concluding that the trustee was entitled to turnover of the funds pursuant to 11 U.S.C. § 105(a), irrespective of the time limitation imposed by 11 U.S.C. § 549. They also argue that a trustee seeking to avoid a post-petition transfer of property may only proceed under 11 U.S.C. § 549. In this Court's Memorandum Opinion and Order, the Court discussed the availability of 11 U.S.C. §§ 105(a) and 542 in this particular case and concluded that both were available to the trustee and that pursuant to both sections the trustee was entitled to turnover of the funds. Thus, rather than repeating the discussion from the earlier Memorandum Opinion and Order, the Court will adopt the discussion from pages 9 through 15 as if

restated here.

Finally, Cuevas and Concepción argue that the judgment should be amended to direct them to turn over to the trustee the amounts that each received as compensation for their professional services. They indicate that the sum of \$27,456.00 was divided equally between them. As the trustee does not dispute Cuevas and Concepción's representations as to how the funds were split, the Court concludes that each should be held liable for that portion of the fees actually received. Thus, the judgment will be amended to indicate that each is liable in the amount of \$13,728.00.

ORDER

Wherefore, IT IS ORDERED that the joint motion by Cuevas and Concepción to alter or amend judgment is granted to the extent that they request that the amount of the judgment be divided evenly between them. The joint motion shall be, and hereby is, denied in all other respects. The defendants, José Cuevas Segarra, his spouse, Amneris Martínez, and the conjugal partnership constituted between them are liable to the trustee on the third cause of action in the amount of \$13,728.00. The defendants Antonio Concepción, his spouse, Agna Morales, and the conjugal partnership constituted between them are liable to the trustee on the third cause of action in the amount of \$13,728.00.

There being no just reason for delay, the Clerk shall enter an amended judgment in favor of the trustee and against the aforementioned defendants on the third cause of action, in the sums indicated above together with interest thereon at the legal rate from May 1989 until repaid.

SO ORDERED.

Dated at San Juan, Puerto Rico, this _____ day of October, 1995.

BY THE COURT:

GERARDO A. CARLO
U. S. Bankruptcy Judge